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IN THE

Supreme Court of the United States

October Term, 1950

No. 5, Original

STATE OF NEW JERSEY,

Complainant,

against

STATE OF NEW YORK and CITY OF NEW YORK,

Defendants,

COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

BRIEF ON BEHALF OF THE STATE OF NEW YORK IN OPPOSITION TO MOTION OF THE CITY OF PHILADELPHIA FOR LEAVE TO INTERVENE AND TO FILE AN ANSWER TO THE PETITION OF THE CITY OF NEW YORK FOR MODIFICATION OF DECREE

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Statement

This brief is addressed in opposition to the motion of the City of Philadelphia by which it seeks leave of this Court to intervene in the litigation, to file an answer to the petition of the City of New York for modification of the decree entered herein (283 U. S. 805) and to participate in all proceedings and hearings to be had on the said petition of the City of New York.

Status of the Litigation

This is an original suit in this Court brought by the State of New Jersey on May 13, 1929 against the State of New York and the City of New York praying for injunctive relief against a proposed diversion of water from tributaries within the State of New York of the Delaware River. Issue was joined by the service of answers by the defendants. The Commonwealth of Pennsylvania was granted permission by this Court to intervene on January 6, 1930, upon condition that it file "a statement of her interest in this cause and of the relief, if any, which she seeks" (280 U. S. 528). The Commonwealth filed the Statement of Interest and Relief on January 10, 1930.

Thereafter and on January 27, 1930, this Court appointed the Honorable Charles N. Burch, Special Master to take evidence, make findings of fact and conclusions of law and submit the same to this Court with his recommendations for a decree (280 U. S. 533). The Special Master, during 1930, held the required hearings, and duly filed, early in 1931, his Report, Findings, Conclusions and Recommendations for a Decree.

This Court, on May 4, 1931, rendered its decision (283 U. S. 336) confirming the Special Master's Report. The decree of this Court, in conformity with its decision, was entered on May 25, 1931 (283 U. S. 805). By its provisions, the decree enjoined the State of New York and the City of New York from diverting from the Delaware River or its tributaries more than the equivalent of 440 million gallons of water daily. The authorized daily diversion of the equivalent of 440 million gallons is subject to a prescribed formula for the release from storage of water during periods of low flow and to provisions for the treatment of sewage and industrial waste. The decree further provides:

"6. Any of the parties hereto, complainant, defendants or intervener, may apply at the foot of this decree for other or further action or relief and this Court retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy."

Pursuant to the provisions of the sixth decretal paragraph, the City of New York moved this Court for leave to file its petition dated April 1st, 1952 to modify the decree. The State of New York moved for leave to file a memorandum in support of the petition of the City of New York. The motions were granted by this Court on June 9, 1952 (343 U. S. 974). On the same day, this Court referred the petition of the City of New York, the memorandum of the State of New York and the answers of the State of New Jersey and the Commonwealth of Pennsylvania to Hon. Kurt F. Pantzer as a Special Master, with directions and authority to proceed to a consideration of the issues involved and to report to the Court his recommendations in respect of the amendment of the decree, if any (343 U. S. 974). On February 9, 1953, this Court granted the motion of the State of New Jersey to file an amended and supplemental answer, and the motion of the Commonwealth of Pennsylvania to file an amended answer.

Since his appointment as Special Master, Mr. Pantzer has held numerous conferences with counsel for all parties. As a result, the City of New York has circulated in written form a great portion of its direct testimony and evidence in support of its petition.

The Pending Petition of the City of New York

By its petition, the City of New York seeks modification of the decree in two respects, an increase in the authorized diversion from the equivalent of 440 million gallons daily to the equivalent of 800 million gallons daily, and the substitution of a new formula for releases during low flows for the formula prescribed by the decree.

In compliance with Article XI of the Conservation Law of New York (Consolidated Laws of New York, Chapter 65) and as a required condition precedent to its pending petition, the City of New York applied to the Water Power and Control Commission of the State of New York for approval of its plans for the project by which it can obtain the additional diversion. The project calls for the construction of a storage reservior on the West Branch of the Delaware River at Cannonsville, New York, of a capacity to provide a dependable yield sufficient to permit the additional diversion. As required by the statute, the Commission held public hearings on the City's application, and on November 14, 1950, the Commission rendered its decision approving, with certain modifications and on certain conditions, the City's plan (a copy of the Commission's decision is printed as Exhibit B, appended to the instant petition of the City of New York, pp. 16-42). In its decision, the Commission found that the City's plans were justified by public necessity, and imposed, among others, the following condition:

> "A. This decision and approval shall have no force and effect until and unless the City of New York has applied to and secured from the United States Supreme Court a modification of its decree in New Jersey v. New York *et al.*, rendered on May 25, 1931 and reported in 283 U. S. 805, in which the city is restrained from diverting from the Delaware River or its

> tributaries to the city's water supply system water in excess of 440 million gallons daily. Thereafter this decision and approval shall be effective only within the limitations which that court might impose."

The memorandum of the State of New York, on file and referred by order of this Court to the Special Master, urges "that the relief prayed for by the City of New York be granted."

The Motion of the City of Philadelphia

Neither the motion nor the proposed answer annexed thereto state or allege that the Commonwealth of Pennsylvania, as *parens patriae,* is not properly representing and protecting the interests and welfare of its citizens. The basis upon which Philadelphia seeks to intervene and to act independently of its sovereign, the Commonwealth, apparently is a provision of the present Constitution of Pennsylvania as implemented by the First Class City Home Rule Act adopted by the General Assembly which "granted broad powers of local self-government to the City of Philadelphia" (Motion, ¶¶ 2, 6-11). The proposed answer of Philadelphia alleges in substance the same contentions and grounds alleged in the amended answer of Pennsylvania, and prays for the same relief demanded by the Commonwealth, the dismissal of the petition of the City of New York.

Summary of Argument

The State of New York contends that the proposed intervention of the City of Philadelphia, if granted, would in effect be an affirmative action against the State of New York without its consent and thus prohibited by the Eleventh Amendment to the Constitution of the United States.

It further contends that the Commonwealth of Pennsylvania is the only proper party to represent its citizens including the City of Philadelphia in this litigation.

ARGUMENT

POINT I

The proposed intervention by the City of Philadelphia would be in effect an affirmative action against the State of New York without its consent and prohibited by the Eleventh Amendment to the Constitution of the United States.

The Eleventh Amendment to the Constitution of the United States cloaks the State of New York with immunity against suit in the courts of the United States by citizens of another state. It reads:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."

For purposes of jurisdiction, the City of Philadelphia, a municipal corporation, is a citizen of the Commonwealth of Pennsylvania.

> *Port of Seattle* v. *Oregon & Washington R. R.*, 255 U. S. 56, 71;
> *Chicot County* v. *Sherwood*, 148 U. S. 529;
> *Lincoln County* v. *Luning*, 133 U. S. 529.

This Court held in *Wisconsin* v. *Duluth*, 96 U. S. 379 (1877):

> "This is a bill in chancery, filed in this court by the State of Wisconsin, by virtue of the constitutional provision which confers upon the court jurisdiction of suits between the States and between a State and citizens of other States. To the bill as originally brought the city of Duluth, as a corporation of the State of Minnesota, and, therefore, a citizen of that State, and the Northern Pacific Railroad Company, a corporation organized under an act of Congress, were made defendants."

In *New Hampshire* v. *Louisiana; New York* v. *Louisiana*, 108 U. S. 76 (1883), this Court, construing the Eleventh Amendment, stated (p. 88):

> "The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another State. * * *" (original emphasis)

And, at page 91:

> "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued * * *."

The State of New York has not consented to be sued by the City of Philadelphia, nor has it waived its immunity against suit under the Eleventh Amendment.

The principle expressed in the *New Hampshire* and *New York* cases, *supra*, has been consistently followed and reiterated in subsequent decisions of this Court. More recently in *Ford Motor Co.* v. *Department of Treasury of Indiana et al.*, 323 U. S. 459 (1944), it is stated at pages 464, 465:

> "This express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent.

Hans v. *Louisiana*, 134 U. S. 1, 10; *Ex parte New York*, 256 U. S. 490, 497; *Missouri* v. *Fiske*, 290 U. S. 18, 25; *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506, 512; *Great Northern Insurance Co.* v. *Read*, *supra*; *State* v. *Mutual Life Ins. Co.*, 175 Ind. 59, 71, 93 N. E. 213; *Hogston* v. *Bell*, 185 Ind. 536, 548, 112 N. E. 883. While the state's immunity from suit may be waived, *Clark* v. *Barnard*, 108 U. S. 436, 447; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273; *Missouri* v. *Fiske*, 290 U. S. 18, 24, there is nothing to indicate authorization of such waiver by Indiana in the present proceeding."

See, also:

Great Northern Insurance Co. v. *Read*, 322 U. S. 47, 51 (1943).

The principle is applicable to the proposed intervention by the City of Philadelphia. The fact that the City seeks intervention in a pending suit rather than the institution of a separate suit is not material.

"We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayers*, 123 U. S. 443, 490-99; *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296-98."

Ford Motor Co. v. *Department of Treasury of Indiana et al.*, 323 U. S. 459, 464.

The objection to a suit on grounds of immunity is fundamental without regard to the form of the proposed pleading or the status of the parties as plaintiffs or defendants.

cf. *Nassau Smelting Works* v. *U. S.*, 266 U. S. 101, 106 (1924); *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1901).

The basic question is whether the State of New York has a substantial interest in the present case which would

be challenged or effected by the intervention. It has such an interest.

The Court of Appeals of New York has defined the duty and powers of the State over its water resources and their use. In *Matter of City of Syracuse* v. *Gibbs*, 283 N. Y. 275 (1940), the Court held at pages 282, 283:

> "We, therefore, are bound to conclude that, by those acts of the Legislature, no exclusive dominion over the waters was given or intended to be given by the State. By the express language used, a contrary intent was clearly expressed. *But, even though the intent of the Legislature had been such as the city claims, its purpose could not have been constitutionally accomplished (Smith* v. *City of Rochester*, 92 N. Y. 463; *Sweet* v. *City of Syracuse, supra).* It was the duty of the State to control and conserve its water resources for the benefit of all the inhabitants of the State. The public right to the benefit of such resources is an incident of sovereignty. The Legislature, when acting within constitutional limitations and in the interest of the public, may, at will, grant, withhold, or condition the privilege to a municipality of taking water from a public source (*Sweet* v. *City of Syracuse, supra; City of Trenton* v. *State of New Jersey*, 262 U. S. 182; *People ex rel. Burhans* v. *City of New York*, 198 N. Y. 439; *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271, 300, 301; *Hathorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326). The Legislature may delegate the performance of its duty to an agency or commission, but the agency can act only within the scope of the powers delegated expressly or by necessary implication to enable it to carry out the powers expressly given (*People ex rel. Municipal Gas Co.* v. *Public Service Comm.*, 224 N. Y. 156, 165). Whatever the city got by the statutes upon which it relies was subject to the reserve powers of the State to control, in the public interest, the use of the waters of the lake (*People ex rel. Burhans* v. *City of New York, supra; Matter of Niagara Falls Power Co.* v. *Water Power & Control Comm.*, 267 N. Y. 265, 276)." (emphasis added)

And further, at pages 284, 285:

> "We need not further trace the statutory changes affecting control over the water resources of the State except to say that the Water Power and Control Commission was created by chapter 619 of the Laws of 1926 by what has, by amendments, finally emerged as section 396 of the Conservation Law with powers and duties carried over from the antecedent statutes (Conservation Law, § 399). Without change since 1911, no municipal unit has been permitted 'to acquire, or to take a water supply or an additional water supply' without the approval of the commission in charge (Conservation Law, § 521).
>
> "Consequently, since 1911, no authority existed by which the city of Syracuse could secure an additional supply of water from Skaneateles lake without the approval of its plans by the suitable commission through the Conservation Department."

This Court has stated a similar rule as to the nature of the power of the States over the control, conservation and use of their water resources for the benefit of their inhabitants. In *City of Trenton* v. *New Jersey*, 262 U. S. 182 (1922), it was held (pp. 185, 186):

> "The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources. * * * The only way the City could acquire the right to take the water of the Delaware River was by grant from the State or by authorized purchase or condemnation from one to whom the right had been granted by the State. * * * The power to determine the conditions upon which waters may be so diverted is a legislative function. The State may grant or withhold the privilege as it sees fit. * * *
>
> "* * * The City is a political subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the State as

> may be entrusted to it. The diversion of waters from the sources of supply for the use of the inhabitants of the State is a proper and legitimate function of the State."

The administration of the State's powers and functions is still vested in its agency, the Water Power and Control Commission consisting of the State's Conservation Commissioner, Superintendent of Public Works and Attorney General (Conservation Law of New York, Article V). The taking of a public water supply or additional water supply is regulated by Article XI of the same statute. The statute (§ 521) still provides, as expressed in the *City of Syracuse* case, that no municipal corporation of the State may take such a supply or additional supply without the approval of the Commission.

On an application by a municipality, the Commission must hold a public hearing, receive evidence and make its decision in writing. Among the questions required by the statute to be determined by the Commission is whether the plans of the municipality "are justified by public necessity." Thus, the ultimate determination of public necessity is vested in the State and not in the applying municipality. If that question and others, required by the statute but not material to this argument, are determined favorably to the municipality, the Commission approves the plan as presented or as modified (Conservation Law, § 523).

It was the finding of public necessity and the approval of the plans of the City of New York by the Commission in 1929 which led to the original institution of this suit by New Jersey. Without such finding and approval, the City of New York then could not have been threatening to do the acts about which New Jersey complained and against which it sought relief. Likewise, it is the Commission's finding of public necessity and the approval of the plan

of the City of New York which constitutes the jurisdictional basis for the City's present application for modification of the decree. Without a plan approved by the Commission, the City could not invoke the Court's jurisdiction (*Connecticut* v. *Massachusetts*, 282 U. S. 660).

The doctrine of equitable apportionment which has been applied in this suit is applicable to the State of New York rather than the City of New York. Equitable apportionment is among the interested States and not their citizens or municipalities.

The injunction prescribed by the decree in this suit runs to the State of New York and the City of New York (283 U. S. 805). The State of New York is restrained from diverting more than the equivalent of 440 million gallons of water daily. It has authorized an additional diversion of the equivalent of 360 million gallons daily through the mechanics of approval of the plan of New York City, subject, of course, to the further approval of this Court by modification of the decree. The State of New York seeks such modification by supporting the present application of the City of New York and urging that the relief sought by the City be granted.

In approving the plan of the City of New York and in supporting the present application for modification, the State of New York is and has been exercising its sovereign powers for the benefit of its inhabitants, more than half of whom are dependent for water supplies upon the supply system of the City of New York.

It is these acts and powers of the State of New York which the City of Philadelphia, as an intervenor, seeks to challenge by praying for a dismissal of the petition of the City of New York. In fact and in effect the proposed inter-

vention would constitute an action against the State of New York without its consent.

Philadelphia apparently seeks escape from the ban against such an action by reason of a "home rule" provision of the Constitution of Pennsylvania implemented by legislative and charter enactments (Philadelphia's Motion, pars. 2, 6-11). We accept the interpretation of the Attorney General of Pennsylvania (Pennsylvania's Answer to Philadelphia's Petition, par. 2) that "the broad powers of home rule granted the City of Philadelphia in 1949 do not abrogate or in any manner qualify the sovereign prerogative of the Commonwealth as such *parens patriae.*" But regardless of the local effect and interpretation of the home rule enactments, they cannot be given the scope of vesting the City of Philadelphia with the sovereign stature of a State of the Union with power to invoke the original jurisdiction of this Court in an action against the State of New York.

Nor does the fact that the City of New York is a party defendant alter the situation. Philadelphia urges that fact as a further basis for intervention. This action was brought *against* the City of New York by the sovereign State of New Jersey. The original jurisdiction of this Court was derived from Article 3, section 2, of the Constitution of the United States. It has been held that such jurisdiction does not extend, by reason of the provisions of the Eleventh Amendment, to actions *by* a citizen of one State *against* another State. The City of Philadelphia could not bring an original suit against the State of New York. What cannot be accomplished directly may not be accomplished by indirection *(New Hampshire* v. *Louisiana; New York* v. *Louisiana,* 108 U. S. 76).

POINT II

The Commonwealth of Pennsylvania is the proper party as parens patriae to represent the interests of all its citizens including the City of Philadelphia in this suit.

The Commonwealth was permitted to intervene in this litigation by order of this Court to protect its interests and the interests of its citizens and municipalities. It was required to and did file a statement of its interests and of the relief desired by it. Arguing before Mr. Burch, the Special Master, the Attorney General of Pennsylvania made the following statement of position (Special Master's Report, p. 184):

> "So that Pennsylvania comes here in a dual capacity. We stand here as defendant when it comes to consideration of the rule which should apply to the question of using water for water supply from the Delaware River.
>
> "We come here as a plaintiff to the extent, but only to the extent, of asking that New York's taking water at this time shall be so surrounded with proper conditions as to safeguard the interests of our State in the future."

Among the items of relief demanded by Pennsylvania was that the doctrine of equitable apportionment between the States be applied. The Court adopted the doctrine.

> "A State suing, or sued, in this Court, by virtue of the original jurisdiction over controversies between States, must be deemed to represent all its citizens. The appropriate appearance here of a State by its proper officers, either as complainant or defendant, *is conclusive upon this point.* Citizens, voters and taxpayers, merely as such, of either State, without a showing of any further and proper interest, have no separate individual right to contest in such a suit the position taken by the State itself. Otherwise, all the

citizens of both States, as one citizen, voter and taxpayer has as much right as another in this respect, would be entitled to be heard. An individual citizen may be made a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted." (Emphasis added)

Kentucky v. *Indiana*, 281 U. S. 163, 173, 174 (1929).

In *New York* v. *New Jersey*, 256 U. S. 296 (1920), the principle was stated (pp. 303, 304) as follows:

"But we need not inquire curiously as to the rights of the State of New York derived from this compact, for, wholly aside from it, and regardless of the precise location of the boundary line, the right of the State to maintain such a suit as is stated in the bill is very clear. The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States. *Missouri* v. *Illinois*, 180 U. S. 208, 241, 243; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230."

In approving the application of the City of New York to take an additional source of water supply from a tributary of the Delaware River, the State of New York exercised a sovereign power in the interest of the health and welfare of its citizens (*City of Trenton* v. *New Jersey*, *supra*, pp. 185, 186). The original jurisdiction of this Court to challenge this sovereign act is available only to sister States and not to their citizens. There is no showing here by Philadelphia of a further or proper interest beyond that of all citizens and municipalities of New Jer-

sey as well as Pennsylvania in the equitable apportionment of the use of the waters of the Delaware River and its tributaries.

Pennsylvania v. *West Virginia,* 262 U. S. 553, was an original suit in this Court in which an injunction was granted against a defendant State against enforcement by it of one of its statutes which would have largely cut off the supply of natural gas theretofore carried by pipe lines from West Virginia into the territory of the plaintiff. At page 595 the Court said:

> "It also is objected that the consumers in the defendant state who will be benefited if the act is enforced have no representation in the suits. But this is a misconception. They are represented by that state, and there is nothing in the situation requiring that they be specially represented or brought in. With equal basis it could be objected in a suit to prevent the enforcement of a statute reducing railroad freight rates, or in one to prevent the enforcement of a municipal ordinance reducing telephone or electric light rates, that shippers or users who would be benefited by the reduction must be specially represented or brought in. Such an objection would, of course, be untenable; and so of the objection here."

In *Wisconsin* v. *Illinois,* 279 U. S. 821, there was a question quite similar to that now to be determined. That was a motion by the City of Chicago for leave to intervene in the Chicago diversion case which had then been pending for some years and had been referred to the Honorable Charles Evans Hughes, 271 U. S. 650. Testimony had been taken, a decision had been rendered (278 U. S. 367) and the matter was pending on re-reference, but this Court denied the motion of the City of Chicago for leave to intervene.

Conclusion

The motion of the City of Philadelphia should in all respects be denied.

Dated: Albany, New York, February 24, 1953.

Respectfully submitted,

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